

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

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	)	
In Re: JIMMY FRANKLIN HENDRICKS	)	Chapter 7
	)	Case No. 06-50335
Debtor.	)	
	)	
	)	

**DECISION AND ORDER**

At Harrisonburg in said District this 29th day of May 2007:

The matter before the court is the Trustee's Objection to the Debtor's Claim of Exemption in certain realty in Augusta County, Virginia. The court conducted a hearing on the objection in Staunton on October 31, 2006. Both parties submitted authorities in support of their respective positions. After due consideration of the evidence and authorities and for the reasons stated herein, the objection is overruled.

**BACKGROUND**

The facts relevant to a decision in this case are not in dispute.<sup>1</sup> The Debtor and his non-debtor spouse own two parcels of real property as tenants by the entirety. On July 27, 2006, the Debtor filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code. The Debtor claimed both properties as exempt.

On August 17, 2005, prior to the filing of his bankruptcy, the Debtor and his spouse executed a Post-Nuptial Property Settlement Agreement (herein "Agreement"). The Agreement provided the Debtor with the option to refinance the couple's credit line

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<sup>1</sup> The facts relied upon by both parties have been set forth in a joint stipulation filed with the court. See Docket Entry # 21.

deed of trust in favor of BB&T, removing the wife as an obligor (herein “refinance option”). The Debtor had 60 days to exercise the option. In return, his wife was required to convey her interest in the above-mentioned realty to the Debtor.

As of the date of the petition, the Debtor had not refinanced the credit line deed of trust and his wife had not conveyed her interest in the realty to the Debtor. Record title of the realty remains in the name of the Debtor and his wife. The Debtor and his wife are still married, and while separated, have not received a final divorce.

On September 14, 2006, the Trustee filed an objection to the Debtor’s claim of exemption in the realty seeking the disallowance of any tenancy by the entireties exemption claimed by the Debtor in the real estate.

### **DISCUSSION**

This court has jurisdiction over the parties and subject matter of this proceeding under 28 U.S.C. §§ 151, 157, and 1334. This is a case filed under Title 11. The court may hear this core proceeding under Section 157(b)(2)(B). Venue is proper in this District under 28 U.S.C. § 1409(a).

The filing of a bankruptcy petition creates an estate consisting of the debtor’s property. 11 U.S.C. § 541(a). The bankruptcy trustee administers the estate, which is comprised of all legal or equitable interests of the debtor in property as of the commencement of the estate. Id.; Bunker v. Peyton (In re Bunker), 312 F.3d 145, 150 (4th Cir. 2002). Entireties property is part of the bankruptcy estate. Bunker, 312 F.3d at 150 (citing Sumy v. Schlossberg, 777 F.2d 921, 923 (4th Cir. 1985)).

A debtor may exempt certain property from the estate, rendering it unavailable to

satisfy any debt of the debtor that arose before the commencement of the estate. 11 U.S.C. § 522(b)-(c). A debtor may exempt “any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety . . . to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law.” 11 U.S.C. § 522(b)(2)(B). In this case, Virginia law is the “applicable nonbankruptcy law.” See Bunker, 312 F.3d at 151 (applying Virginia law on tenancies by the entirety in a case concerning Virginia debtors). Under Virginia law, a debtor may exempt entireties property from the bankruptcy estate. Id. at 151-155.

In Virginia, a tenancy by the entireties may only be severed by death, divorce or mutual agreement. Bunker, 312 F.3d at 152 (citing Hausman v. Hausman, 233 Va. 1, 353 S.E.2d 710, 711 (1987)); Vasilion v. Vasilion, 192 Va. 735, 740, 66 S.E. 2d 599, 602 (1951). Although the Debtor and his wife are married, the Trustee seeks to assume the Agreement and take the necessary steps under the Agreement to sever the tenancy by the entireties. That is, the Trustee seeks to sever the tenancy by the entireties by mutual agreement so that the Debtor cannot properly claim the property as exempt.

A trustee may, subject to the court’s approval, assume or reject any executory contract to which the debtor is a party. 11 U.S.C. § 365(a). The Fourth Circuit applies Professor Countryman’s test for determining whether a contract is “executory.” Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1045 (4th Cir.1985); Gloria Manufacturing Corp. v. International Ladies’ Garment Workers’ Union, 734 F.2d 1020, 1022 (4th Cir.1984). According to the Countryman test, a contract is executory if

the “obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.” Id. (quoting Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973); see also NLRB v. Bildisco and Bildisco, 465 U.S. 513, 523 n.6 (1984) (explaining that Congress intended the term to apply to contracts “on which performance remains due to some extent on both sides.” (internal citation omitted))).

The Agreement does not constitute an executory contract, because neither the refinance option nor the other sections of the Agreement are executory in nature. The refinance option is unexercised and most courts hold that an unexercised option is not an executory contract. BNY Capital Funding LLC v. US Airways, Inc., 345 B.R. 549 (E.D. Va. 2006) (citing Bronner v. Chenoweth-Massie P’ship (In re Nat’l Fin. Realty Trust), 226 B.R. 586, 589 (Bankr. W.D. Ky.1998) (“Unperformed obligations become due if, and only if, the optionee exercises the option. . . . If the option is not exercised, the unperformed obligations never become due and neither party commits a breach.”)). Furthermore, the executory nature of a contract is determined as of the date of filing the bankruptcy petition. BNY Capital Funding LLC v. US Airways, Inc., 345 B.R. 549, 553 (E.D. Va. 2006); In re Timberline Property Dev., Inc., 115 B.R. 787 (Bankr. D. N.J. 1990); In re Norquist, 43 B.R. 224, 230 (Bankr. E.D. Wash. 1984). The Debtor and his wife executed the Agreement on August 17, 2005. The Agreement required the Debtor exercise the refinance option, if at all, within 60 days of the execution of the Agreement. The Debtor did not exercise the refinance option during the 60 day time period causing

the option to expire by its own terms before the Debtor filed his bankruptcy petition. Therefore, the refinance option expired before the date of filing and did not render the Agreement executory on the date of filing.

Aside from the refinance option, the other terms of the Agreement do not create an executory contract. Failure by either the spouse to perform the promises made in the Agreement do not excuse performance of the other spouse. Therefore, the notion of an executory contract that “the failure of either to complete performance would constitute a material breach excusing performance by the other,” is absent. In re Castriota, 35 B.R. 160, 161 (Bankr. N.D. Ga. 1983).

Finally, even if the Agreement is an executory contract, practical considerations prevent the Trustee from severing the tenancy by the entirety. First, as discussed above, the option expired by its own terms, therefore, leaving Trustee unable to sever the tenancy by the entireties under the Agreement. See, e.g., Vanderpark Props., Inc. v. Buchbinder (In re Windmill Farms, Inc.), 841 F.2d 1467, 1469 (9th Cir. 1988) (“If a lease of nonresidential real property has been terminated under state law before the filing of a bankruptcy petition, there is nothing left for the trustee to assume.”). Second, the Agreement, if assumed, would require the Trustee pay the wife \$75,000 as consideration for her conveyance of the entireties property. However, the estate lacks these funds. Therefore, even if the refinance option was executory and had not expired, the Trustee could not exercise the option for want of the necessary funds.

## **CONCLUSION**

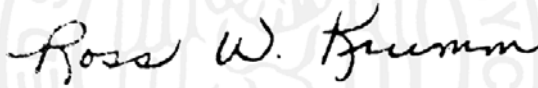
For the above-stated reasons, the court finds that the Agreement is not an

executory contract and the refinance option expired by its own terms prior to the filing of bankruptcy by the Debtor. Therefore, the Trustee may not assume the Agreement. Accordingly, it is

**ORDERED:**

That the Trustee's Objection to the Debtor's Claim of Exemption is  
OVERRULED.

Copies of this order are directed to be sent to counsel for the Debtor, Douglas E. Little, P.O. Box 254, Charlottesville, VA 22902; and to Charles R. Allen, Jr., 120 Church Avenue SW, Roanoke, VA 24011.



*Ross W. Krumm*

Ross W. Krumm  
U. S. Bankruptcy Judge